COPY

No.—

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DANIEL J. McCAULEY, JR.,
General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,

E. K. ELKINS,
Attorney,
Federal Trade Commission,
Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	14
Appendix A	16
Appendix B	29
Appendix C	30

CITATIONS

Cases:	
Bush v. *Chicago B. & Q. R. Co.*, 22 F.R.D. 188 (D. Neb. 1958)	8
Connecticut Importing Co. v. *Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn. 1940)	6, 8
Federal Trade Commission v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959)	7
In re Sultana, 77 F. Supp. 287 (W.D.N.Y. 1948)	8
Karlsson v. *Wolfson*, 18 F.R.D. 474 (D. Minn. 1956)	8
Kingsley v. *Del. L. & W.R. Co.*, 20 F.R.D. 156 (S.D.N.Y. 1957)	8
Samish v. *Superior Court*, 28 Cal. App. 2d 685 (1938), 83 P. 2d 305	6
Star v. *Rogolny*, 22 F.R.D. 256 (E.D. Ill. 1958)	8
Tollefson v. *Phillips*, 16 F.R.D. 348 (D. Mass. 1954)	8
United States v. *Continental Can Company*, Civil Action 112-387 (S.D.NY.)	4
United States v. *St. Regis Paper Co.*, 181 F. Supp. 862 (S.D.N.Y. 1960)	4
Statutes:	
Census Act of 1902, 32 Stat. 52	10
Census Act of 1919, 40 Stat. 1291	9, 10

Statutes—Continued

	Page
Census Act of 1929, 46 Stat. 21; 13 U.S.C. 1940 ed. 1, *et seq.*:	
Section 1	10
Section 4	10
Section 21	10
Census Act of 1948, 62 Stat. 478	6
Clayton Act, 38 Stat. 730, Section 7	2, 4
Federal Trade Commission Act:	
Section 5(a)(1); 15 U.S.C. 45(a)(1)	2
Section 6, 38 Stat. 721; 15 U.S.C. 46	2, 7, 14, 30
Section 9, 38 Stat. 722; 15 U.S.C. 49	2, 3, 7, 31
Section 10, 38 Stat. 723; 15 U.S.C. 50	14
Title 13, United States Code, Section 8	9, 11
Title 13, United States Code, Section 9	2, 4, 6, 7, 9, 32
Title 13, United States Code, Section 131	10
Title 13, United States Code, Section 132	2, 6, 32
Title 13, United States Code, Section 141	10
Miscellaneous:	
26 C.F.R. 1939 ed. 458.52-57, 458.110-12	8
56 Cong. Rec. 8658-59	9
H. Rep. 960, 60th Cong., 1st Sess., p. 5	9
36 Op. Att. Gen. 362 (1930)	10, 11
Presidential Proclamation dated November 22, 1929, 46 Stat. 3011	11

In the Supreme Court of the United States

OCTOBER TERM, 1960

No.—

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Federal Trade Commission prays that a writ of ceritorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 4, 1960, which reversed the order of the District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 16–28) is reported at 276 F. 2d 739. The District Court did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1960, (Appendix B, *infra*, p. 29). The time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark, on June 27,

1960, to and including August 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 9 of the Census Act, which prohibits personnel of the Department of Commerce from disclosing reports submitted to the Census Bureau, precludes the Federal Trade Commission from subpoenaing from reporting companies their retained copies of schedules submitted to the Census Bureau in conjunction with the census of manufactures.

STATUTES INVOLVED

The statutes involved are Sections 6 and 9 of the Federal Trade Commission Act, (38 Stat. 721, 722; 15 U.S.C. 46, 49), and Sections 9 and 132 of the Census Act (13 U.S.C. 9, 132). Their pertinent provisions are set forth in Appendix C, *infra*, pp. 29–32.

STATEMENT

The Federal Trade Commission issued a complaint on October 16, 1956, alleging in substance that Beatrice Foods Co. ("Beatrice"), through a series of 44 acquisitions of other corporations also engaged in interstate commerce, has violated the provisions of Section 7 of the Clayton Act, and, by those and a further series of 87 acquisitions of non-corporate businesses, has violated the provisions of Section 5(a)(1) of the Federal Trade Commission Act (Commission Appendix 1b–14b).[1] Beatrice's answer in substance admitted the majority of the acquisitions but denied

[1] The printed appendix to the Commission's brief in the Court of Appeals.

their illegality. A number of hearings have been held and considerable evidence has been received.

On December 30, 1958, a subpoena was served upon Dilger, as Secretary of Beatrice, requiring him to testify and to produce the corporation's retained copies of schedules submitted to the Bureau of the Census in conjunction with the 1954 census of manufactures, and copies of all correspondence clarifying or amending those schedules or reports (Dilger Appendix 7a–8a).[2]

After denial by the hearing examiner of a motion to quash and by the Commission of an interlocutory appeal from that denial, followed by a ruling of the hearing examiner that the subpoenaed documents be produced under seal, received *in camera*, and not made public, respondent refused to appear, testify, or produce the documents.

The Commission thereupon applied to the District Court for the Northern District of Illinois, Eastern Division, for an order requiring respondent to appear before the hearing examiner and testify and produce the documentary evidence (Dilger Appendix 2a–7a). The jurisdiction of the District Court was invoked under Section 9 of the Federal Trade Commission Act, 38 Stat. 722; 15 U.S.C. 49. The Court entered such an order, which included provision for protection of the documents from revelation to Beatrice's competitors, in accordance with Commission practice (Dilger Appendix 34a–35a).

---

[2] The printed appendix to respondent's brief in the Court of Appeals.

The Court of Appeals reversed, holding that "the Commission cannot compel the production of a copy of a census schedule in possession of the company that furnished the original thereof to the Census Bureau" (Appendix A, *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

In this case the Court of Appeals, taking a position directly contrary to three District Court rulings, has held that Section 9 of the Census Act prohibits the Commission from requiring production of a company's retained copies of census schedules, for use in antitrust litigation.[3] We submit that this ruling presents an important question in antitrust litigation which this Court should review, and that the holding of the Court of Appeals is erroneous because it rests upon a basic misconception of Section 9 of the Census Act and creates a privilege for copies of census schedules which the Congress neither enacted nor intended to enact.

(1) Continued access to such copies of schedules is important to the Commission's enforcement of the antitrust laws. Relevant market-share data are essential to resolution of Clayton Act, Section 7, cases and Federal Trade Commission Act anti-merger cases. Frequently the only data in existence which afford a reliably informative comparison between one com-

[3] In addition to the decision of the District Court in this case, such schedules were held subject to process in *United States* v. *St. Regis Paper Company*, 181 F. Supp. 862, 866 (S.D.N.Y. 1960), and in an unreported ruling cited therein, made in *United States* v. *Continental Can Company*, Civil Action 112-387 in the same court.

pany's activities on the one hand and the total of those of all such companies on the other, are the Census Bureau's compilations (so-called "universe" figures), made in a census of manufactures, and the individual company's report submitted in the same census. For many industries no other pairs of figures exist which have been prepared on the same bases of definitions, areas, products, periods of time, etc.—all essential if comparison of figures is to be meaningful. Usually such alternative compilations as are available in company files are not prepared on those bases and hence are not comparable with the "universe" figures, and reconstruction of comparable compilations from basic records is either impossible or prohibitively time-consuming and expensive. [redacted]

In addition to 29 anti-merger cases in present litigation, the Commission is now formally investigating about 90 mergers a year and examining about 800 more; as of June 30, 1960, 86 such investigations were in progress. For many years the Commission, like the Antitrust Division of the Department of Justice, has obtained and used retained copies of reports to the Census Bureau in making preliminary evaluations of mergers and in merger litigation. A number of companies have voluntarily obtained from the Bureau copies of reports which they had not retained, for submission to the Commission in lieu of less convenient production.

If the decision below is allowed to stand, then in the future when companies refuse to co-operate, as many do, either such investigations must be completed

and litigated cases decided without the illuminating market-share data or, in each instance, law enforcement agencies must duplicate the work already done in the taking of the census of manufactures.

(2) The Court of Appeals' decision construed Section 9(a) of the Census Act, which by its plain terms merely limits the use and release of census information by employees of the Department of Commerce,[4] as also preventing access by the commission to corporate records consisting of copies of schedules submitted to the Census Bureau. In so doing it departed from the rule that statutory constructions having the effect of suppressing otherwise competent evidence are to be avoided where not required by the statutory language,[5] and disregarded the mandate of Section 132 of the Census Act (adopted with the 1948 authorization for the census of manufacturers, 62 Stat. 478) that nothing in that Act "shall be deemed to revoke or impair the

[4] It provides:

"Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

[5] *Connecticut Importing Co.* v. *Continental Distilling Corporation*, 1 F.R.D. 190, 191–2 (D. Conn. 1940). The reason for the rule was well stated in *Samish* v. *Superior Court*, 28 Cal. App. 2d 685 (1938), 83 P. 2d 305, 310: "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes."

authority of any other Federal agency with respect to the collection or release of information." The quoted saving clause, which would have been totally unnecessary if it referred to information other than that collected by the Census Bureau, expresses the legislative intent that Section 9 of the Census Act not be extended by construction beyond its terms in such a way as to prevent exercise by the Commission of its powers under Sections 6 and 9 of the Federal Trade Commission Act.

In so extending the statute the court has created, for corporate records showing the business information supplied to the Census Bureau, a protection against discovery and use in litigation which the statute discloses the Congress not merely had no intention of creating, but intended to avoid being added by construction of the limited protection it did create. The court thus has supplied "what Congress has studiously omitted," *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

The court declined to follow the many decisions holding that litigants may be required to produce copies of their income-tax returns, distinguishing them on the ground that the internal Revenue Code contains authority "whereby such tax returns may be made available" (Appendix A, *infra*, p. 25). Actually, however, when those decisions were rendered, as now, the Code and regulations thereunder expressly limited the Treasury's release of such returns,[6] and a number of decisions reveal that the

[6] Under the Code and the regulations it authorized an individual's return could be inspected and copies obtained only by (a) the person who made it or his attorney in fact, (b) his administrator, etc., or (c) his heirs, etc., in the discretion of the

courts realized that the parties seeking the production from their opponents of copies of those opponents' income tax returns were precluded from obtaining them from the Treasury.[7] These cases are, therefore, analogous to this one and their reasoning is applicable here.

(3) In reaching its decision the court expressed its reliance upon unidentified portions of the legislative history of the Census Act, upon certain statements quoted from a Presidential Proclamation and an Attorney General's Opinion, and upon statements in letters attributed to the Director of the Bureau of the Census. These it regarded as "assurances of confidentiality and protection" constituting "a pledge of good faith on the part of the Congress, the President and the Department of Commerce" (*id., infra,* p. 27). It apparently regarded those statements as having been addressed to business firms, relating to the census of manufactures, and applicable to retained copies of schedules submitted to the Bureau.

Although the court did not cite the portions of the legislative history upon which it based its conclusion that the Congress "gave unreserved assurances that no

---

Commissioner. Similar restrictions applied to joint, partnership, estate, trust, and corporation returns. See 26 C.F.R. 1939 ed. 458.52–57. In addition, release was allowed for use in litigation but only in cases in which the United States was "interested in the result." See 26 C.F.R. 1939 ed. 458.110–12.

[7] *Star* v. *Rogolny*, 22 F.R.D. 256, 258 (E.D. Ill. 1958); *Bush* v. *Chicago B. & Q. R. Co.*, 22 F.R.D. 188, 189 (D. Neb. 1958); *Kingsley* v. *Del. L. & W. R. Co.*, 20 F.R.D. 156, 158–9 (S.D.N.Y. 1957); *Karlsson v. Wolfson*, 18 F.R.D. 474, 476 (D. Minn. 1956); *Tollefson* v. *Phillips*, 16 F.R.D. 348, 349 (D. Mass. 1954); *In re Sultana*, 77 F. Supp. 287, 288 (W.D.N.Y. 1948); and *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn. 1940).

harm would come from compliance" (*id., infra*, p. 27), the only pertinent parts we have discovered in that history are two items cited in the briefs below. These were a discussion appearing at 56 Cong. Rec. 8658–59, and a paragraph on page 5 of H. Rep. 960, 60th Cong., 1st Sess., both concerning provisions in the 1919 Census Act (40 Stat. 1291). The discussion was of a legislator's doubts as to whether a provision similar to the present Section 8(c) would accomplish its purpose of preventing the Census Bureau from giving out to business firms their competitor's trade secrets. It did not touch upon retained copies of reports, did not give any "assurances" that business secrets, if reported to the Bureau, would become confidential or immune from process, and did not pertain to or express any views at all about the predecessor of Section 9, which the court has construed to prevent the production.

The House Report likewise contains no support for the court's construction, since it relates only to penal provisions "giving the Director larger authority in securing answers to questions contained in the schedules and greater power in safeguarding the work against unauthorized publicity."[5]

---

[5] The paragraph continued:

"These provisions are believed to be of great importance in securing the best results. Protection against promiscuous or general publicity is of vital importance in securing complete and accurate statements from those engaged in manufacturing and mining particularly. It is the policy of the Census Office to consider all schedules and other information officially obtained as for use exclusively for statistical purposes, and information is given in the confidence that that policy will be observed. The office is not a general information bureau, except for purely statistical data."

The court's reliance upon a 1930 Opinion of the Attorney General (36 Op. Att. Gen. 362) and upon a Presidential Proclamation partially quoted therein was also misplaced; neither pertained to information obtained in a census of manufactures, neither was addressed to business firms or concerned their operating data, and neither ruled upon or gave "assurances" about records kept by business firms. Each pertained to the use and release by the Department of Commerce of family information obtained from individuals in the 1930 Decennial Census.[9]

The Attorney General expressed the opinion that the Director of the Census Bureau could not comply with a request to him from the Woman's Bureau of the Department of Labor, which had asked for "the names, addresses, occupations, and status of employment of workers in the city of Rochester, N.Y.," and "the names and addresses of persons in given sections and communities who are unable to read and write—all such information in your possession having been gathered for the fifteenth decennial census." (36 Op.

[9] That census was of "population, agriculture, irrigation, drainage, distribution, unemployment, and mines," but not of manufactures. (See Sections 1 and 4, 46 Stat. 21, 22; 13 U.S.C. 1940 ed. 201, 204.) The 1929 Census Act did not provide for the taking of a census of manufactures either with the 1930 Decennial Census or otherwise; it repealed the 1919 Act (40 Stat. 1291) and continued the 1902 Act (32 Stat. 52) as otherwise amended (Section 21, 46 Stat. 26). This revived the 1902 Act's provision for taking the census of manufactures in years ending in the numeral 5. (See 13 U.S.C. 1940 ed. 112.)

It is now required by 13 U.S.C. 131 to be taken every fifth year after 1954, separate from the decennial census required by 13 U.S.C. 141.

Att. Gen. 362-63). In addition, the opinion was based upon a provision of the 1929 Act similar to Section 8(c), which, as the court below noted (Appendix A, *infra*, p. 20), is inapplicable to the census of manufactures.

The Presidential Proclamation (which appears in full at 46 Stat. 3011–12), immediately preceding the portion quoted in the court's opinion, revealed that it was addressed to families rather than businesses, and that its sole purpose and total possible effect was to assuage the fears of individuals that the 1930 Decennial Census might result in exposure of family secrets.[10] It could not, therefore, have been understood by business firms as assurances to them of immunity from legal process for their retained copies of schedules to be submitted on the next census of manufacturers, and should not be so construed now.

Nor is the court's conclusion supported by its quotation from the document it designates as "Defendant's Trial Exhibit 2," which appears to be a form letter used by the Census Bureau in connection with the 1955 Survey of Manufacturers.[11] It merely com-

[10] The unquoted portion here pertinent was:

"Now, therefore, I, Herbert Hoover, President of the United States of America, do hereby declare and make known that, under the law aforesaid, it is the duty of every person to answer all questions on the Census schedules applying to him and the family to which he belongs, and to the farm occupied by him or his family, and all other Census schedules as required by law, and that any person refusing to do so is subject to penalty."

[11] We say "appears" because the document was only marked for identification in the District Court, as part of an already rejected offer of proof upon a different issue, and was never authenticated or offered or received in evidence.

mented upon the Bureau's care of returns made to it, and mentioned the use which recipient companies might make of their retained copies of census schedules in preparing their 1955 Annual Survey reports.

The opinion reveals the source of the court's erroneous impression about the legislative history of the Census Act. The court quoted, but disavowed reliance upon, a letter from the Director of the Census Bureau to counsel for a private company. The first sentence of that letter stated the view that certain sections of Title 13 "were enacted for the purpose of protecting companies against any harm which might result from their complying with a Census reporting requirement." The court obviously accepted that as correct, since it is repeated in different words throughout the opinion, and can have come from no other source; no such purpose was stated in the legislative history or expressed in the statute's provisions. The view was incorrect, since the only evinced and implemented legislative purposes were to prevent the Census Bureau from giving to business secrets "promiscuous or general publicity" and revealing them to competitors, and at the same time to avoid their insulation from the powers of other federal agencies. [12]

[12] As the court noted (Appendix A, *infra*, p. 26), that letter explained the Bureau's refusal to give to a company copies of its own schedules, which it had requested in order to comply with a Commission subpoena. Lest this should mislead, it should also be noted that in objecting to consideration of this letter the Commission pointed out that the Bureau subsequently granted that request and a similar one by another company. See Commission's brief, p. 28, note.

The court noted, without discussion of its possible significance, the fact that the subpoenaed copies of the schedules contain the printed statement "keep this copy for your files." See, *e.g.*, Dilger Appendix p. 22a. This appeared beneath the block in which, on both originals and copies, companies were advised of the time within which the report was to be returned, that its submission was required, that the report "is confidential and only sworn Census employees will have access to it," and that it "cannot be used for purposes of taxation, investigation or regulation." This is the only statement quoted by the court which we think could possibly be understood by business firms as meaning that their retained copies could not be subpoenaed for use by the Commission in its investigations; it is our view that such a construction would be erroneous, because the term "report" necessarily refers to the original submitted to the Bureau. The court's failure to construe it or otherwise express reliance upon it constitutes, we believe, a correct evaluation of its insubstantiality as support for the decision.

(4) The decision below would subordinate the public interest in effective enforcement of the antitrust laws to the countervailing interest of business firms in avoiding the use of their own statements about their business affairs as evidence against them in litigation. The issue in this case is whether the Con-

gress has created any such subordination. We believe that it has not, that instead it gave and intended to give to reporting businesses a protection only against exposure, by the Bureau of the Census, of their business secrets to competitors—a protection given by both the District Court order (Dilger Appendix 34a–35a) and the Commission's order (Commission Appendix 23b–24b), in accordance with the Commission's practice under the provisions of Sections 6(f) and 10 of its organic Act (38 Stat. 721, 723; 15 U.S.C. 46(f), 50).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL J. MCCAULEY, JR.,
General Counsel,
ALAN B. HOBBES,
Assistant General Counsel,
E. K. ELKINS,
Attorney,
Federal Trade Commission.

The Federal Trade Commission and the Antitrust Division of the Department of Justice believe that the decision below is erroneous, raises questions of substantial importance in the enforcement of antitrust and other regulatory laws, and warrants review by this Court. On the other hand, the Bureau of the Census and the Bureau of the Budget believe that the decision below is correct and should not be

reviewed by this Court. Accordingly, I am authorizing the filing of this petition for a writ of certiorari without signing it and therefore not supporting it.

J. LEE RANKIN,
Solicitor General.

AUGUST 1960.

562497—60——3

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

September Term, 1959—April Session, 1960
No. 12801

FEDERAL TRADE COMMISSION, PETITIONER-APPELLEE

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO., RESPONDENT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

April 4, 1960

Before HASTINGS, *Chief Judge*, KNOCH, *Circuit Judge* and PLATT, *District Judge*

HASTINGS, *Chief Judge*. This is an appeal from a district court order requiring respondent-appellant, Walter L. Dilger, as secretary of Beatrice Foods Co. (Beatrice), to comply with a subpoena *duces tecum* issued by the Federal Trade Commission, petitioner-appellee (Commission), in the course of a proceeding against Beatrice.

In the main proceeding,[1] out of which this ancillary action arose, the Commission filed a complaint against Beatrice on October 16, 1956, alleging in substance that Beatrice, through a series of 44 acquisitions of other corporations, violated the "merger" provisions of Section 7 of the Clayton Act, 15 U.S.C.A. § 18

[1] *In re Beatrice Foods Company*, F.T.C. Docket No. 6653.

(38 Stat. 731, as amended, 64 Stat. 1125); and, by those and a further series of 87 acquisitions of non-corporate businesses, violated the "practices" provisions of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C.A. §45(a)(1) (38 Stat. 717, as amended, 66 Stat. 632). During the course of hearings held since that time, Beatrice has furnished certain documentary evidence in response to three earlier subpoenas.

On December 30, 1958, the disputed subpoena was served upon Beatrice's secretary requiring him to produce:

> 1. All schedules submitted to the Bureau of the Census on Form MC 20C by all plants, manufacturing establishments or units owned or controlled by your concern in conjunction with the 1954 census of manufacturers together with copies of all correspondence clarifying or amending said schedules or reports.

It has been understood by all parties that the subpoena demands the corporation's retained "copies" of the census forms or schedules prepared by Beatrice and now held in its corporate files.

The hearing examiner denied a motion by Beatrice to quash this fourth subpoena; and the Commission subsequently denied an interlocutory appeal therefrom, ruling that the corporation's retained copies of the census reports were not privileged, that the examiner could and should receive the records sought under appropriate orders to withhold from competitors the information therein set out, and that such information was material and relevant to the issues in the main proceedings. Subsequently, the hearing examiner ordered the subpoenaed documents produced under seal at a hearing set for May 5, 1959, the records to be received *in camera* and not to be made available for inspection by anyone other than

parties to the proceeding. Compliance with the subpoena was refused and the hearing adjourned. The Commission thereupon instituted the instant action in the district court to enforce the subpoena.

The district court granted the Commission's enforcement petition and ordered Beatrice to produce its copies of the census reports for use in the *Beatrice* case and denied enforcement for two related cases against National Dairy Products Company and The Borden Company. This appeal is from the enforcement order in the *Beatrice* case. The Commission has not appealed from the denial in the other two related cases.

Appellant charges error in three adverse holdings by the district court; the contested issues arising therefrom may be summarized as follows:

> I. Whether the provisions of Sections 8 and 9 of the Census Act, 13 U.S.C.A. §§ 8, 9, create a "privilege" prohibiting the production and use in litigation by the Federal Trade Commission against Beatrice of copies of census reports or schedules prepared by Beatrice and submitted to the Bureau of the Census, such "copies" having been retained by Beatrice in its corporate files?
>
> II. Whether Section 8 of the Federal Trade Commission Act[2] requires the Commission first to attempt to obtain information from the Department of Commerce by a request to the President before issuing a subpoena or seeking its enforcement?

---

[2] 15 U.S.C.A. § 48 (38 Stat. 722) provides: "The several departments and bureaus of the Government *when directed by the President* shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions [of this Act] and shall detail from time to time such officials and employees to the commission as he may direct." [Emphasis added.]

III. Whether the district court, in an ancillary subpoena enforcement proceeding, must hear evidence for the purpose of determining whether the record before the Commission in a pending administrative proceeding already contains evidence sufficient to enable it to decide the issues therein without the documents called for by the subpoena?

I

The subpoena in question required the production of copies of all schedules prepared by Beatrice and submitted to the Department of Commerce, Bureau of the Census, on Form MC 20C in conjunction with the 1954 census. These schedules were prepared on forms furnished by the Census Bureau, and each schedule (original and copy) had printed at the top of page one the following:

> "Confidential—This report should be returned within 30 days of its receipt. This report is required by Act of Congress (13 U.S.C. 131). Your report is confidential and only sworn Census employees will have access to it. *It cannot be used for purposes of taxation, investigation or regulation.*" [Emphasis added.]

The copy of each schedule to be retained by the company preparing it had printed across the bottom of the page in bold type:

> KEEP THIS COPY FOR YOUR FILES

The 1954 manufacturer's census was taken pursuant to the Census Act, 13 U.S.C.A. § 131. Section 224 of the Act imposes criminal penalties for failure to respond completely and correctly to requests for information from the Department of Commerce in connection with such census. Section 214 imposes criminal penalties upon Government employees for wrong-

ful disclosure of information coming into their possession by reason of their employment.

Section 8 of the Census Act authorizes the Secretary of the Department of Commerce, in his discretion, to make available for genealogical and other purposes certain returns and data from the population, agriculture and housing schedules (manufacturing schedules are not mentioned); and Section 8(c) provides, "In no case shall information furnished under authority of this section be used to the detriment of the persons to whom such information relates."

The so-called "privilege" or "prohibition" provisions of the Census Act are found in Section 9, which read in applicable part:

> §9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) *permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.* [Emphasis added.]

The Commission contends, in support of the holding below, that the express language in Section 9, *supra*, restrains only the actions of the Secretary of Commerce and officers and employees of his Department and that such restraint or privilege is limited solely to information in the custody of the Bureau of the Census. It argues that no privilege is extended for information or records (such as the retained

copies in this instance) remaining in the possession of persons who make reports to the Bureau. It goes further to urge that the Congress "studiously omitted" the privilege asserted by appellant. The Commission agrees that there is an expressed motive of encouraging candid reports to the Bureau of the Census, but says that this was sufficiently implemented by the provision limiting the use and release of those reports by the Bureau. It points to the lack of any statutory requirement that the reporting party shall keep and maintain copies of reports made by it. In short, the Commission seeks a strict and narrow interpretation of Section 9, limited to the precision of its expression and arrangement, that the Congress "intended to enact, no more and no less."

In seeking a reversal here, Beatrice urges that the Congress and the Executive Department intended that the schedules be used only for the purpose for which they were collected; that individuals and citizens supplying confidential information should not be harmed thereby; that the information furnished should not be used to the detriment of the parties submitting it; and that the information should remain confidential between the Bureau of the Census and the party submitting it. It argues that the basic objectives and purposes of the Census Act cannot be avoided by a limited or restrictive interpretation, but that it must be given that meaning which will carry out the expressed legislative policy. Beatrice strongly insists that to give effect to the Commission's position would result in frustration of the Congressional purposes and lead to a contradictory and absurd result.

Both parties have made reference to the legislative history of the Census Act. Without attempting to set out a summary of such material here, a review of

this history makes it clear to us that the Congress sought to encourage the cooperation of individuals and businesses in furnishing requested information and to that end gave unreserved assurances that no harm would result from compliance; that there need be no fear that disclosures would be made; and that for the protection of the rights and interests of persons furnishing information, severe criminal penalties would be invoked.

It is also quite clear that the Executive Department of the United States Government has expressed this same view. The Department of Justice, in an opinion dated September 29, 1930, from the Attorney General, William D. Mitchell, to the Secretary of Commerce,[3] stated that the Director of the Census should decline to furnish certain requested census information to the Women's Bureau of the Department of Labor. This opinion makes reference to the legislative history and Congressional purpose of the Census Act, as well as to certain statutory provisions. It significantly quotes from a proclamation of the President of the United States on November 22, 1929, issued after the enactment of the Act of June 18, 1929 (Public Law No. 13, 71st Cong.), wherein it was said to the people that:

> The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any na-

[3] 36 Ops. Att'y Gen. 362 (1930).

> tional, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge.

Defendant's Trial Exhibit 2[4] is a letter from the Director of the Bureau of the Census sent out in 1955 to manufacturers. It enclosed copies of the "Annual Survey of Manufacturers Form MA-100" for reporting operations during 1955. It calls attention to the statutory requirement for filing the report and says: "The law also requires that your report be held absolutely confidential. It cannot be used for purposes of taxation, regulation, or investigation." It gives instruction in the method of preparation of the 1955 report and significantly directs the manufacturers in the precise manner of "using your 'File Copy' of the 1954 Census of Manufacturers report."

The Commission argues that the foregoing documents relate solely to information in the possession of the Census Bureau and to disclosure by officials and employees of that Bureau. It contends they have no application to retained copies in the custody of the informant. In effect, the Commission concedes that it could not enforce a subpoena against the Census Bureau and require the production of the original schedule on file there. *It seeks now to do indirectly that which it cannot do directly.* We cannot believe the Congress intended such a result.

This precise and important issue has not been passed upon by a court of appellate review. The

[4] This letter is set out in full in appellant's brief, pages 28a-30a.

only reported case called to our attention construing 13 U.S.C.A. §§ 8, 9 is *United States* v. *Bethlehem Steel Corporation,* D.C. S.D.N.Y., 21 F.R.D. 568 (1958). In that case the United States brought an action against two steel companies to enjoin them from proceeding with a proposed merger charged to be in violation of the Clayton Act. The United States moved for an order requiring the companies to produce copies of reports filed by them with the Department of Commerce, Bureau of the Census. The companies did *not* oppose production of the copies of the reports, but urged, *as a condition,* that the United States be required to supply the companies with copies of similar reports filed by other major steel producers. The Census Bureau refused to make this information available to the Department of Justice or to any other person. The district court, in an opinion by Judge Weinfeld, held that the United States could not be required to supply defendants with reports filed by other major steel producers, since such reports were confidential under the statute.

While the facts and the issue in the *Bethlehem Steel* case, *supra,* are different from those in the case at bar, Judge Weinfeld gave careful consideration to the privilege statute and its legislative history. He concluded that it is the *information* furnished to the Census Bureau that is privileged, saying:

> One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in

> the enactment of laws and other purposes in the national interests. Accordingly, Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse. 21 F.R.D. at 570.

The Commission next contends that income tax decisions are squarely analogous and constitute authoritative precedent for compelling the production of copies of otherwise privileged information. We do not believe this asserted parallel runs true. Cases holding that copies of income tax returns can be produced involve an entirely different statute and Congressional purpose. Under the provisions of 26 U.S.C.A. § 6103 there is Congressional authority whereby such tax returns may be made available. With limited exceptions found in Section 8, there is no such authority given in the Census Act. As Mr. Justice Frankfurter said in *Trade Comm'n* v. *Bunte Bros.*, 312 U.S. 349, 353 (1941), "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

It is said here that the data compiled in the manufacturer's census schedule is but a summary of information to be found in the company's other business records available to the Commission and that no harm can come to Beatrice as a result of producing its copy of the schedule. The Commission urges that it will thereby be saved considerable time and effort in attempting to make its own summary. However, such census schedules are cast in their proper perspective by the Director of the Bureau of the Census in the following statement:

> The section of Title 13 dealing with confidentiality of Census reports were enacted for the purpose of protecting companies against any

> harm which might result from their complying with a Census reporting requirement. This privileged relationship enables the Census Bureau to require response to inquiries which are necessarily formulated on a uniform basis for all companies in a particular activity regardless of whether or not their books of record directly yield the requested information. For this and other reasons estimates and approximations are necessarily acceptable in statistical reporting to an extent that woud not be acceptable for financial or certain other purposes. Furthermore, it is essential to the economical and speedy consummation of statistical programs that the rules governing reporting permit the companies to authorize subordinate officials to furnish information directly before formal clearance with comptrollers, auditors or company counsel, and that this information frequently be furnished before final figures have been developed in the company record system. In brief, the confidential relationship which is present in Census reporting is vital to its effectiveness.[*]

We are aware that such a letter cannot serve as authoritative precedent in this court, but does clearly describe the conditions under which such schedules are prepared.

In light of the foregoing review, we conclude that the Commission cannot compel the production of a copy of a census schedule in possession of the company that furnished the original thereof to the Census Bureau through enforcement of a subpoena *duces tecum*. To hold to the contrary, we believe, would run counter to the Congressional purpose of the Census

[*] Taken from a letter dated April 29, 1959, shown in full on pages 30a–32a of appellant's brief, in which a company was refused copies of its own census schedules in order to comply with a Federal Trade Commission subpoena.

Act and the assurances given by the Government to the public. These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. We do not think that another arm of the Government (the Federal Trade Commission) can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it.

Courts should construe a statute agreeable with its dominant purpose so as to carry out the legislative policy. *S.E.C.* v. *Joiner Corp.*, 320 U.S. 344, 350–51 (1943). We do not agree that we are here attempting to "supply what Congress has studiously omitted," as was the case in *F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

We hold that the district court erred in ordering enforcement of the subpoena in question.

II

We agree with the Commission that it was not required to ask the President to direct the Bureau of the Census to furnish it the requested information before issuing a subpoena or seeking its enforcement. We read no such mandate in Section 8 of the Federal Trade Commission Act, 15 U.S.C.A. § 48. Cf. *Fleming* v. *Montgomery Ward & Co.*, 7 Cir., 114 F. 2d 384, 392 (1940), cert. denied, 311 U.S. 690. No cases have been cited in support of appellant's contention. Neither do we believe that the doctrine of exhaustion of administrative or extra-judicial remedies has any application to the problem facing us in the case at bar.

We hold that the district court did not err in rejecting this contention of appellant.

III

We further hold with the Commission that the district court did not err in refusing to hear evidence offered by appellant for the purpose of showing that the Commission had in its record evidence sufficient to enable it to decide the issues before it without the documents called for by the subpoena. The district court properly observed that the state of the record before the Commission was not in issue before it. The question of relevancy in relation to the admissability of the document in question remains an open question to be determined in a proper forum. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322, 323–324 (1957).

Having held, under the issue considered in part I herein, that the district court erred in ordering enforcement of the subpoena in question, the order of the district court appealed from is reversed; and this cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

A true Copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

CHICAGO 10, ILLINOIS,
Monday April 4, 1960.

Before Hon. JOHN S. HASTINGS, *Chief Judge,* Hon. WIN G. KNOCH, *Circuit Judge,* Hon. CASPER PLATT, *District Judge*

No. 12801

FEDERAL TRADE COMMISSION, PETITIONER-APPELLEE

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO., RESPONDENT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and That This Cause Be, and It Is Hereby, Remanded to the Said District Court for Further Proceedings Not Inconsistent With the Opinion of This Court Filed This Day.

APPENDIX C

Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, provides in pertinent part:

> That the commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.
>
> (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.
>
> * * * * *
>
> (f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public

interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49, provides in pertinent part:

> That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and

any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 9 of the Census Act, 13 U.S.C. 9, provides in pertinent part:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Section 132 of the Census Act, 13 U.S.C. 132, provides in pertinent part:

> * * * nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

U.S. GOVERNMENT PRINTING OFFICE 1960

ILE COPY

Office Supreme Court, U.S.
FILED
SEP 20 1950
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 375

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

WALTER L. DIEGER, SECRETARY, BEATRICE FOODS CO.,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS A. REYNOLDS,
EDWARD J. WYNNSTRA,
EDWARD L. FOOTE,
38 S. Dearborn Street,
Chicago 3, Illinois,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 375.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

Respondent, Walter L. Dilger, answers the Petition for a Writ of Certiorari filed herein and prays that the Petition be denied.

QUESTION PRESENTED.

Whether the lower court erred in holding that the Federal Trade Commission could not compel production of copies of Census reports retained by a reporting company at the direction and for the further statistical purposes of the Census Bureau when the use sought to be made by petitioner of the information in said copies was precisely the use permitted by the Census Act to no one but authorized personnel of the Department of Commerce?

STATEMENT.

In 1955 Beatrice Foods Co. received original and duplicate Census of Manufactures forms prepared by the Department of Commerce pursuant to the provisions of the Census Act, 13 U. S. C. 5. The duplicates on the front page in boldface type bear the word "Confidential" followed by the statement: "Your report is confidential and only sworn census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation." This representation was followed by a mandate in boldface type: "Keep this copy for your files."

On January 7, 1959, the Federal Trade Commission served three subpoenas duces tecum on Beatrice by service on its Secretary, Walter L. Dilger, the respondent herein. These subpoenas required the production of the census copies referred to above in three Federal Trade Commission anti-merger proceedings (Clayton Act, Section 7) pending in three separate dockets against Beatrice Foods Co., National Dairy Products Corporation, and The Borden Company.

The Hearing Examiner and the Federal Trade Commission denied Beatrice's motion to quash the subpoenas and ordered Beatrice's census records produced, not only in the Beatrice docket but also in the dockets of its competitors, National Dairy and Borden. Upon Beatrice's refusal to produce the documents, the Federal Trade Commission petitioned the United States District Court in Chicago for an enforcement order on all three subpoenas. Upon hearing, the District Court denied the Commission's request in connection with the subpoenas issued in the National Dairy and The Borden Company dockets. From that part of the order the Commission has taken no appeal.

The District Court further ordered Beatrice to produce its census schedules to be used against Beatrice in its

own litigation—and from this part of the order Beatrice appealed. Only at that time did the Commission assume the position now asserted on page 14 of the petition that the census schedules should not be made available to competitors, and the claim that this position is in accordance with petitioner's practice (Pet. p. 14) is contradicted by the Commission's practice in this very case.

The Court of Appeals reversed the District Court and held that the privilege was intended to protect the person supplying the data and covered copies of schedules retained by Beatrice at the direction of and for the further statistical use of the Department of Commerce.

ARGUMENT.

The Supreme Court's discretionary power to accept jurisdiction in this matter should not be exercised because petitioner has not established special and important reasons as required by the rules of this Court.

The principal reason advanced by petitioner appears in paragraph (1) (Pet. pp. 4-5) where the Court of Appeals' decision is portrayed as a major bottleneck to enforcement of the anti-merger law. Both litigated and non-litigated cases must now be determined, it is contended, "without illuminating market share data." This argument is embroidered with volunteered statistics concerning the volume of such cases now pending.

The relevant census statutes, together with their Congressional history, make it clear that *no one*, including the petitioner, may have access for any purpose to any schedule filed with the Census Bureau by a reporting company under the sanction of criminal penalties—and the Federal Trade Commission does not claim otherwise.

Having the same access to any and all census "universes" as does the general public—petitioner seeks to violate the integrity of these figures as statistics and to destroy their anonymity by reaching the industry-retained counterpart of the original report.

Prescinding from the moral implications residing in this sort of governmental behavior, it is submitted that petitioner's alleged claim of urgent necessity in the circumstances stated will not be met and satisfied by a reversal of the decision below unless it is to be supposed that corporate executives will thereafter retain in their files copies of their census reports. It should not surprise petitioner if outraged businessmen trapped between these

two governmental agencies will solve the problem in their own interests by not retaining the counterparts in their files — an eventuality contributing nothing to the solution of petitioner's alleged enforcement difficulties—but adding woes to the Census Bureau in its attempt to carry out the statutory duties assigned to it by Congress.

Petitioner's argument that the privilege extended to reporting companies by the provisions of the Census Act is limited to "protection only against exposure, by the Bureau of the Census, of their business secrets to competitors" flies in the face of the language of the statute which provides in Sec. 9(a)(3) that "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in Section 8 of this title * * * (3) permit anyone other than the sworn officers and employees of the department or bureau or agency thereof to examine the individual reports." The contention that this language is capable of being construed into a permission for the Federal Trade Commission to gain access to the individual reports filed with Census constitutes a shining example of the outer limits of bureaucratic zealousness but should not be accepted by this Court as an important reason for granting the writ.

The acceptance of this argument, moreover, would compound the unfairness of the trap into which Beatrice would have fallen because of its compliance with the Census Statute in that petitioner now claims the right to use copies of Beatrice's census schedules to determine Beatrice's several market shares at the same time it is denying Beatrice the right of access to the like census schedules of each of its competitors in each relevant market data which Beatrice would then need to enable it to defend itself by demonstrating the market shares of each of its competitors in explanation or rebuttal of the inferences that petitioner

would seek to draw from the record, thus made, in the absence of this evidence.

Apart from the foregoing considerations, the Court of Appeals decided this case correctly. Petitioner concedes that a statutory privilege exists, that original census records mailed to the Bureau of the Census could not be subpoenaed, and that data if actually "furnished" to petitioner by the Bureau are specifically privileged (Census Act, Sec. 8). Petitioner further agrees that each copy now subject to subpoena contains on its face assurances that it "cannot be used for taxation, investigation or regulation". These documents are in no way business records maintained by business for business reasons as petitioner clearly demonstrates at page 5 of its Petition. Petitioner itself there characterizes them as unique and different "reports" to be distinguished from ordinary company "files". They are Census documents retained at the request of the Bureau of the Census. As Chief Judge Hastings, for a unanimous court, stated in the opinion below:

> "These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. We do not think that another arm of the Government (the Federal Trade Commission) can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it."

CONCLUSION.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS A. REYNOLDS,
EDWARD J. WENDROW,
EDWARD L. FOOTE,
Attorneys for Respondent.

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 30 1960
JAMES R. BROWNING, Clerk

No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY,
BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF COMMERCE

ROBERT J. DODDS, JR.,
General Counsel,

KENNETH F. MCCLURE,
Assistant General Counsel,

MATTHEW E. ERICKSON,
Attorney,

Department of Commerce, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 375

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY,
BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF COMMERCE

At the request of the Secretary of Commerce, the attached memorandum setting forth his views on the issues presented by this case is respectfully submitted to the Court.

J. LEE RANKIN,
Solicitor General.

The Secretary of Commerce believes that the decision of the Court of Appeals in this case is correct, and that a contrary decision would have an extremely serious effect on the operations of the Department of Commerce. This memorandum describes the practical

and policy considerations which, in the view of the Secretary of Commerce, require that retained copies of census reports be kept confidential and not subject to subpoena by the Federal Trade Commission.

The Department of Commerce through the Bureau of the Census takes censuses, including the census of population and housing and the census of business and manufactures. In the census of business and manufactures the reporting company files a schedule with the bureau, and retains a copy for its file. To allow the Federal Trade Commission to subpoena from reporting companies their retained copies of schedules submitted to the Bureau of the Census will seriously interfere with the administration of the program of censuses and the aims of such programs, which are the accumulation and dissemination of comprehensive statistical data. Such data, to be meaningful, must measure characteristics or activities under definitions applied uniformly from company to company and the replies must be promptly furnished and tabulated.

Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of Census is a need which may be assigned little priority by the company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is then that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau of the Census who is familiar

with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon.

This technique of developing information is described in some detail to demonstrate how inappropriate it would be to require these figures for the different purposes of the regulatory agency and more importantly to show how helpless the Bureau of the Census would be in its quest for data once it becomes established that these estimates are available to regulatory agencies. Then the answer, that the records of the company do not provide the information requested by the Bureau of the Census, will become the final answer. This concern is not mere speculation but is based on statements by officials of reporting companies made after the decision of the District Court in this cause.

In the present administration of the Census laws relating to collection of information from businesses, the Census form is filled out by technicians of the reporting company. This is particularly desirable in the interest of prompt reporting and publication of resulting statistics which are of increased value because current. If the individual data instead of being lost in a sea of statistics are to be the subject of scrutiny by regulatory agencies, they will be forth-

coming from the reporting company only after consideration by officials of the company concerned not with accuracy alone but rather with possible effects of the data in the hands of regulatory agencies.

Distinctions which may be drawn between the confidentiality which may attach to the original schedule filed by a company reporting and copies thereof retained in accordance with the express request of the Bureau of the Census by a company reporting are unwarranted in so far as the significance of confidentiality is concerned as it affects the operation of the program of censuses. In so far as integrity of data making up the statistics, and necessary cooperation between the company reporting and the Bureau of the Census are concerned, knowledge that either the original or copies, retained or otherwise, of schedules are to be available for scrutiny by regulatory agencies produces the same imposing handicaps to the Department in its administration of the program of censuses. If the retained copy is available, it does not matter to any of the interested parties that the original is not so available. (Of course, the company's own records and data, on the basis of which the reports are prepared, are not immune from subpoena.)

The importance of the retained copy of such a schedule to the Bureau of the Census should be stressed. This copy serves as a reference point for discussion between the Bureau of the Census and the company reporting. This is true not only of a current census but also of a subsequent census and of intermediate surveys which may be undertaken. In

light of the aim for current data and statistics the importance of a readily available reference is apparent. This copy in the hands of the company reporting is more important to the Bureau of the Census, therefore, than to the company. It is for these reasons that the Census Bureau requests that a copy be retained by the reporting companies; and its promise of confidential treatment of the information contained therein is intended to cover such copy, as well as the original.

The need for prompt and accurate data which would be seriously jeopardized by the availability of retained copies is so important, however, to the Bureau of the Census in carrying out the program of censuses that, if the decision below were reversed and retained copies were made available to regulatory agencies, the Department would have no alternative but to seek other methods of providing workable references. An alternative which suggests itself is the forwarding to the company its original schedule, when needed, to be returned to the Bureau of the Census when the immediate need is fulfilled. This procedure would be less satisfactory to all parties concerned and no retained copies would then be available for scrutiny by others.

Finally, copies of schedules should not be made available because the Department of Commerce should not be prevented from keeping its word to companies reporting when the Department has promised that the report cannot be used for purposes of taxation, investigation, or regulation. This promise parallels the promise of the President set forth in the opinion

of the Court of Appeals based on Section 9 of the Census Act, which is applicable to both censuses of population and housing and censuses of business and manufactures since both are taken under authority of Title 13 of the United States Code. Reversal of the opinion under consideration would make a dead letter of assurances of confidentiality.

The completeness, accuracy, and timeliness of the statistical reporting system of the Bureau of the Census are founded on cooperation by the reporting companies. This cooperation is obtained by pledging the confidentiality of the relationship between the reporting companies and the Bureau of the Census. No threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality; certain of the reports, obtained on a voluntary basis, are not subject to penal provisions for failure to file a report. To intrude into this relationship is to destroy it and thereby seriously impair the ability of the Bureau of the Census to furnish the people and their government necessary measures of the social and economic conditions of the United States.

Respectfully submitted,

ROBERT J. DODDS, JR.,
General Counsel,

KENNETH F. MCCLURE,
Assistant General Counsel,

MATHEW E. ERICKSON,
Attorney,
Department of Commerce.

SEPTEMBER 1960

U. S. GOVERNMENT PRINTING OFFICE 1960 — 586229 355

FILE COPY

Office Supreme Court, U.S.
FILED
OCT 7 1960
JAMES R. BROWNING, Clerk

No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S ANSWER AND TO MEMORANDUM FOR THE SECRETARY OF COMMERCE

DANIEL J. McCAULEY, JR.,
General Counsel,
ALAN B. HOBBES,
Assistant General Counsel,
E. K. ELKINS,
Attorney,
Federal Trade Commission, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 375

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY, BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S ANSWER

1. Respondent errs in saying (Answer, p. 3) that the Commission has assumed "the position * * * that the census schedules should not be made available to competitors," and in saying that the Commission's statement on the subject "is contradicted by the Commission's practice in this very case." Respondent has misunderstood the statement it criticizes (Petition, pp. 13–14), which merely pointed out that the only protection intended by the Congress to be given to business secrets by the Census Act was that against exposure to competitors, and that the same protec-

567484—60

tion is given by both the District Court's order and the Commission's order in this case.*

2. Respondent errs in saying (Answer, p. 3), that the "Court of Appeals * * * held that the privilege * * * covered copies of schedules *retained by Beatrice at the direction of and for the further statistical use of the Department of Commerce.*" The emphasized portion was not held by the court below, nor is it a fact established upon the record; even respondent's proposed findings in the District Court (Dilger Appendix 23a–27a) contain no such assertion.

3. Respondent errs in attributing to the Commission (Answer, p. 5) a contention that Section 9 (a)(3) of the Census Act "is capable of being construed into a permission for the Federal Trade Commission to gain access to the individual reports filed with the Census * * *." The Commission makes no such contention; it contends, on the contrary, that the cited section is entirely inapplicable to the subpoenaed records (Petition 6–7).

4. Respondent errs in attributing to the Commission (Answer, p. 6) an agreement that each subpoenaed copy contains assurances that it cannot be

*The Court order provides (Dilger Appendix 35a) that "the Commission should follow its practice of placing such documents in a confidential file, in order to keep such documents away from the sight and knowledge of all of the [respondent's] competitors * * *." The Commission's order (Commission Appendix 24b) provides: "the hearing examiner can, and should, require that such reports be produced under appropriate protective orders and impounded, or retained under seal, so far as practicable in discharge of the Commission's responsibilities under the law * * *."

used for taxation, investigation or regulation. The Commission contends to the contrary, pointing out (Petition, p. 13) that the comments on the copy pertain only to the report filed with the Census, and not to respondent's retained copies showing what it has reported.

5. Respondent errs in implying (Answer, p. 6) that the subpoenaed records are Census documents rather than company records. Respondent conceded in the Court of Appeals (Brief, p. 20): "The records requested are records of a corporation within 'sections 41–46 and 47–58' [*sic*] of the Federal Trade Commission Act." It is not disputed in this record that the subpoenaed documents were made and kept by the corporation, or that this was done without requirement by statute or regulation to do so, or that the information upon them is solely of the corporation's operations, or that they are in its custody.

REPLY TO MEMORANDUM FOR THE SECRETARY OF COMMERCE

The reasons urged by the Secretary of Commerce for denial of the petition are that he believes that the decision below is correct, and that reversal "would have an extremely serious effect on the operations of the Department of Commerce." The Secretary's memorandum does not discuss the expressed belief that the decision below is correct, confining itself instead to an expression of "the practical and policy considerations" which he believes "require that retained copies of census reports be kept confidential and not subject to subpoena * * *."

We think it fair to characterize those considerations as consisting entirely of reasons why the Secretary believes an immunity to process *ought* to exist for corporations' retained copies of their reports to the Bureau of the Census, and as containing no reason why this Court should conclude that one *does* exist. Since this case turns upon the construction of existing statutory provisions, and the issue it presents is whether by those provisions, properly construed, the Congress *has* created the immunity from process which the Secretary desires, we suggest that his plea is addressed to the wrong forum.

It is the Congress, not the courts, which performs the legislative function of evaluating such "practical and policy considerations" as those urged, in the light of the Congressional objectives embodied not only in the Census Act but also in other legislation, and upon consideration of countervailing national interests and governmental needs, as well as expressions of views from representatives of other interests which might be affected by such legislation. It is not possible for this function to be performed by the courts in the course of litigation. In this case, for example, it is not possible for us here and now to make informed response to the many assertions of fact and statements of opinion contained in the Secretary's memorandum, which are presented in that memorandum for the first time in the case.

While in our view the Secretary's memorandum does not shed light upon the issue of this case, or

urge valid reasons for letting stand an erroneous decision of law, it does, we believe, demonstrate that the matter at issue is one of importance not only to the enforcement of the antitrust laws, as the petition pointed out, but also to the operations of the Bureau of the Census. This, we submit, makes even more evident the importance of its decision by this Court.

The petition for certiorari should be granted.

Respectfully submitted.

DANIEL J. MCCAULEY, JR.,
General Counsel,

ALAN B. HOBBES,
Assistant General Counsel,

E. K. ELKINS,
Attorney,
Federal Trade Commission.

OCTOBER 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960